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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

October, 1986 Term

JEWEL M. COOPER

Petitioner

v.

DIAMOND M COMPANY

Respondant

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JEWEL M. COOPER — Filed Mar 26, 1985

VERSUS — CIVIL ACTION NO. 83-5564

DIAMOND M COMPANY — SECTION: "K" (3)

OPINION

Defendant initially filed its motion for summary judgment on March 1, 1984, to dismiss plaintiff's claim under the Jones Act, 46 U.S.C. §688, as barred by the three year statute of limitations, and to dismiss plaintiff's general maritime law claim of unseaworthiness under the equitable doctrine of laches.

Plaintiff's injury occurred on April 4, 1979; she filed suit over four and one half years later on November 14, 1983, and accordingly, the Jones Act claim was dismissed. Defendant now re-urges its motion to dismiss plaintiff's general maritime claims of unseaworthiness and, added by amended complaint, failure to pay maintenance and cure and for punitive damages.

The parties argued defendant's motion on June 6, 1984, and on August 28, 1984. At the first hearing, the Court granted the summary judgment motion on the Jones Act claim and permitted plaintiff ten days to amend her complaint or file affidavits showing excusable delay or lack of perjudice to the defendant. Plaintiff filed an amended complaint stating she received compensation or maintenance for three years, she did not know the consequences of the three year lapse of time, that defendant had made a thorough investigation at the time of the accident, and, consequently, no prejudice resulted from the delay.

At the second hearing, plaintiff's counsel acknowledged that to defeat the laches defense, plaintiff must prove excusable delay or that the defendant was not prejudiced by the delay. However, counsel stated he had not done any discovery relating to defendant's investigation of the accident or the importance of defendant's now deceased witness. The Court ruled plaintiff's delay was not excusable and asked counsel for plaintiff to conduct discovery to determine whether defendant had been prejudiced by the delay. The Court continued the trial date and rescheduled it for April 15, 1985.

On March 7, 1985, the parites submitted a joint motion stating no further evidence or argument would be offered and asked the Court to decide the defendant's motion on the record before it, and the Court so ordered. Since the August 28, 1984 hearing, plaintiff has not conducted any discovery, or if she has, she has not presented it to the Court. Plaintiff has filed only a second amended complaint alleging a right to maintenance and cure and punitive damages, and a witness list.

The doctrine of laches applies to admiralty claims and the Court looks to the analogous three year statute of limitations contained in the Jones Act. When a plaintiff files suit after the expiration of the limitation period, the plaintiff has the burden of proving excuse for the delay or that the delay did not unduly prejudice the defendnat. *Pizani v. M/V Cotton Blossom*, 669 F.2d 1084 (5th Cir. 1982)(n.1 at 1087); *Mecom v. Lexington Shipbuilding Co.*, 622 F.2d 1209 (5th Cir. 1980); *Watz v. Zapata Off-Shore Company*, 431 F.2d 100 (5th Cir. 1970). As the Court has already ruled, plaintiff's ignorance of her right to sue, or the significance of the three year period, is not excusable

delay. *Akers v. State Marine Lines, Inc.*, 344 F.2d 217 (5th Cir. 1965).

Defendant has submitted the affidavit of its claims manager which states plaintiff's immediate supervisor before and after the accident was Herbert Boechl, who had personal knowledge of the condition of the galley where the unwitnessed accident occurred, and of plaintiff's physical condition. Mr. Boechl died on April 23, 1982, three years and 19 days after the accident. The death of an important witness may constitute prejudice. *Muller v. Lykes Brothers Steamship Co.*, 337 F.Supp. 700 (E.D. La. 1972).

To meet her burden of proof that the defendant has not been unduly prejudice by the delay, plaintiff offers 1) the first amending complaint stating that defendant made a thorough investigation at the time of the accident; and 2) her affidavit that she received compensation until terminated. Plaintiff's counsel argues defendant investigated sufficently to determine compensation was due and that defendants could have taken Mr. Boechl's statement before he died. Defendant's counsel argues compensation is paid whenever an employee is injured, and the investigation to determine an injury is less detailed than an investigation preparatory to a lawsuit.

Plaintiff has not met her burden to show defendant is not unduly prejudiced. Plaintiff offered no facts showing Mr. Boechl's testimony is not marterial, or perhaps cumulative, or that defendant's investigation was sufficient to defend this lawsuit, despite a continuance of the trial date to allow such discovery, and two requests by the Court.

Plaintiff's counsel has further argued that the claim for maintenance and cure is contractual, that laches does not bar it, and, presumably, the state prescriptive period governs. There is some authority for this position, *Loverich v. Warner Company,* 118 F.2d 690 (3rd Cir. 1941), *writ denied,* 313 U.S. 577 (1941), but the better reasoned approach is that maintenance and cure is a maritime claim and laches is applicable. *Ward v. Union Barge Line Corporation,* 443 F.2d 565 (3rd Cir. 1970); *Riddick v. Baltimore Steam Packet Company,* 374 F.2d 871 (4th Cir. 1967).

The motion of Diamond M Company for summary judgment that plaintiff's claims of unseaworthiness and failure to pay maintenance and cure are barred by laches is GRANTED.

It is so ordered.

/s/ illegable

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
March 25, 1985